***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

ORIGINAL

75-7324

# United States Court Of Appeals

## For Second Circuit

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CIVIL APPEAL 75-7324

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DAVID L. SALISBURY
Plaintiff - Appellant

v.

SOUTHERN NEW ENGLAND TELEPHONE CO. ET ALS
Defendant - Appellees

P/S



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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

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BRIEF OF APPELLEE

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES
## TABLE OF CASES

## STATUTES AND OTHER AUTHORITIES

## STATEMENT OF ISSUES

1. DID THE DISTRICT COURT ERR IN GRANTING THE DEFENDANTS' MOTION TO DISMISS UPON RECONSIDERATION THE PLAINTIFF'S COMPLAINT WITHOUT AN EVIDENTIARY HEARING, A COMPLETE RECORD, AND PRIOR TO COMPLETION OF DISCOVERY?

2. DID THE DISTRICT COURT ERR IN HOLDING THAT TERMINATION OF APPELLANT'S TELEPHONE SERVICE DID NOT VIOLATE 42 USC 1983 FOR LACK OF STATE ACTION?

3. DID THE DISTRICT COURT ERR IN HOLDING THAT THE TERMINATION OF APPELLANT'S TELEPHONIC SERVICE DID NOT VIOLATE 42 USC, SECTION 1985, 1986 AND 1988 DUE TO THE LACK OF AN ALLEGATION OF DISCRIMINATORY ANIMUS?

## STATEMENT OF THE CASE

### I. DISTRICT COURT OF PROCEEDINGS

This case was commenced with the filing of the Complaint on May 30, 1973 (App. Doc. 1). Thereafter on June 8, 1973, the defendants filed a Motion to Dismiss (App. Doc. 5) and on November 8, 1973, the Court denied the defendants' Motion to Dismiss (App. Doc. 12) [see **365 F. Supp. 1023**-(D-Conn.-1973] whereupon the defendants entered their Answers and Counterclaim (App. Doc. 16 and 17).

On June 18, 1973, the defendants submitted their Interrogatories, which were either answered or objected to by the plaintiff on July 19, 1973. Subsequent thereto the plaintiff forwarded his Interrogatories, consisting of some 48 pages and some 262 questions. Said Interrogatories were answered to or objected to by the defendants on December 14, 1973.

Subsequent thereto on February 28, 1975, the defendants filed a Motion to Reconsider the defendants' Motion to Dismiss (App. Doc. 34), which motion was suggested by the Court in a prior ruling on February 10, 1975.

This is an appeal commenced on May 21, 1975, claiming error in a Judgment entered against the plaintiff and in favor of the defendants on March 27, 1975 (App. Doc. 37). Said Judgment was based on the ruling of Hon. Robert Zampano (District Court for the District of Connecticut) granting the defendants' Motion to Dismiss Upon Reconsideration (App. Doc. 36).

### II FACTS

Mr. David Salisbury, the plaintiff and appellant, is a subscriber of telephone service from the defendant, Southern New England Telephone Company, Appellee, in the case at bar. Also included as a defendant is William J. O'Keefe, an attorney for the defendant telephone company.

Mr. Salisbury alleges in his Complaint (App. Doc. 1) that he is a subscriber of telephone service from the telephone company at his home in Watertown, Connecticut. The appellant complains that on two separate occasions his telephone service was terminated, once in February 1972, for a period of a week, and again in January 1973 for a period of four months (until this complaint was initiated). The subscriber claims that his telephone service was terminated without notice or hearing and while there was a pending dispute between the parties as to the correctness of certain prior charges. The subscriber further alleges that the termination of his telephone service violates his rights, privileges and immunities secured to him by the Constitution, particularly those rights enjoyed under the First and Fourteenth Amendments.

Mr. Salisbury concludes that his phone service was terminated by the defendant under color of state law, as set forth in the First Count of his Complaint without notice or a hearing. (App. Doc. 1)

The subscriber alleges in the Second Count that the defendants hindered him in the prosecution of state court litigation where he was attempting to recoup certain disputed payments by terminating his service. The Third Count claims that the defendants hindered him in state court litigation by filing allegedly dilatory pleadings.

The plaintiff in his Fourth Count complains that the defendants failed to prevent their employees from terminating his service or from filing dilatory pleadings and that these actions similarly violated his aforementioned rights. Lastly, the subscriber claims in the Fifth Count that the acts of phone service termination and pleading procedure in the state courts be ruled improper, unconstitutional and an injunction issue restraining the defendants from engaging in said conduct.

The Appellant does **not** allege, however, that the Connecticut Public Utilities Commission has held a hearing, ruled, or considered formally the tariff under which the defendant terminated his phone service. (App. Doc. 1, pg. 4-6).

Additionally, the subscriber does **not** allege that the defendants were acting pursuant to a discriminatory class-based animus when it terminated his service. Rather his basis for the proposition that the telephone company acted under color of state law was its monopoly status, its performance of a vital service and its extensive Public Utilities Commission regulation (App. Doc. 1, pg. 2-4).

The plaintiff alleges violations of 42 USC Secs. 1983, 1985, 1986 and 1988 and invokes jurisdiction of this Court, pursuant to Title 28 U.S. Code Secs. 1343, 2201 and 2202. (App. Doc. 1, pg. 1)

## A. DID THE DISTRICT COURT ERR IN GRANTING THE DEFENDANTS' MOTION TO DISMISS UPON RECONSIDERATION THE PLAINTIFF'S COMPLAINT WITHOUT AN EVIDENTIARY HEARING, A COMPLETE RECORD, AND PRIOR TO COMPLETION OF DISCOVERY?

### 1. May a Motion to Dismiss be decided by the District Court without a full evidentiary record and prior to completion of discovery?

The aim, intent and purpose of a Motion to Dismiss is to test the legal sufficiency of the Complaint. **Mullins v. DeSoto Securities Co., Inc.** 136 F. 2d 55 (CAA-5th-1943); **Bing v. General Motors Acceptance Corp.**, 237 F. Supp. 911 (ED-SC-1965).

For purposes of this motion all well-pleaded material allegations are taken as admitted. **Cruz v. Beto** 405 U.S. 319, 31 L.ed. 2d. 263 (1972); **Cooper v. Pate,** 378 U.S. 546, 12 L.ed. 2d 1030 (1964); **Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith** 495 F.2d 228 (CCA-2d-1974).

In **Cruz** the Supreme Court elucidated the following test: "a **complaint** should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief . . . " Supra. at 322, 268 (em

phasis added) See also **Conley v. Gibson** 355 U.S. 41, 2 L.ed. 2d 80 (1957); **Knudsen v. The Torrington Co.** 254 F. 2d 283 (CCA-2nd-1958).

Thus utilizing the above formulation the Court must look to the Complaint to determine if that document sets forth within its perimeters sufficient allegations to establish the claim upon which the plaintiff seeks relief. In other words, the complaint must set forth facts sufficient to establish the foundation of the cause of action.

The District Court is constrained to look only at the complaint in the case at bar and not interrogatories or the defendants' affirmative defenses. **Mullins v. DeSoto Securities Co., Inc.,** Supra. If additional information is submitted to the Court by way of documentation or affidavit, the Court is compelled to treat the Motion to Dismiss as a Motion for a Summary Judgement. **Federal Rule** 56 and **Federal Rule** 12(b); **Erlich v. Glasner** 374 F.2d 681 (CAA-9th-1967).

**2. Does the District Court have the power to reconsider its prior decision denying a Motion to Dismiss the complaint?**

The District Court's earlier denial of the plaintiff's Motion to Dismiss on November 8, 1973, was not final. It left the pleadings in the same stage they were in, had said motion not been filed. Consequently, the District Court still maintained complete jurisdiction of the case and of its progress.

There is posited in the Court the inherent power to reconsider its prior ruling in light of new evidence or law as long as it has jurisdiction. **Marconi Wireless Telegraph Co. of America v. U.S.** 320 U.S. 1, 87 L.ed. 1731 (1942); **John Simmons Co. v. Grier Bros. Co.** 258 U.S. 82, 66 L. ed. 475 (1922); **BonAir Hotel, Inc. v. Time, Inc.** 426 F. 2d 858 (CCA-5th-1970); **Cohn v. U.S.** 259 F.2d 371 (CCA-6th-1958); **Triumph Hosiery Mills v. Triumph International Corp.** 191 F. Supp. 937 (SD-N.Y.-1961) reversed on appeal on other grounds 308 F. 2d 196 (CCA-2nd-1962); **Kliaguine v. Jerome** 91 F. Supp. 809 (Ed-N.Y.-1950).

Thus, it is clear from the above cited cases that the Court in the instant case had the inherent power to reconsider, to modify or otherwise alter, the prior rulings in the case so as to conform to changes in facts, statutory amendments and developing case law.

**3. Were minimal Due Process requirements afforded the plaintiff on the reconsideration of the Motion to Dismiss?**

Certainly when any court rules upon a motion potentially decisive of the issue at bar, the Court must afford the parties certain minimal requirements of due process. In **Dodd v. Spokane County, Washington** 393 F. 2d 330 (CCA-9th-1968), the Ninth Circuit Court of Appeals held that a District Court has the right on its own motion to dismiss the case so long as proper procedural steps were taken and its determination correct. The necessary procedures were that the writ must be served upon the defendant and the court must give the plaintiff notice and the opportunity to be heard with regard to the matter. Due process requires that at least the plaintiff have an opportunity to address the issues. **Literature, Inc. v. Quinn** 482 F.2d 372 (CCA-1st-973). In the case at bar the subscriber had notice of the impending reconsideration of the Motion to Dismiss by virtue of the defendants' Motion. (App. Doc. 34). It placed in issue the question of whether the defendant was acting under color of law and whether the defendants' termination procedure constituted state action.

Additionally, the defendants' earlier Motion to Dismiss (App. Doc. 5) raised the issue of whether the plaintiff's lack of a discrimination allegation was fatal to his claimed 42 USC Sec. 1985 violation. Thus, on both grounds the appellant had sufficient warning of the issues pending before the Court.

Due Process requires that the party be given the opportunity to present testimony, documents, or other evidence in order to resist the pending motion **provided** that the Federal Rules allow for the introduction of extraneous matter in order to decide the motion at bar. **Dodd v. Spokane County, Washington,** Supra.

As we have seen above, the Court on a Motion to Dismiss, should not take into consideration matters outside of the complaint. The additional evidence, testimony, or the like, is improper if presented to the Court at this time. Under these circumstances the opportunity to be heard implies solely that the parties be given the right to brief or be heard on oral argument regarding their relative positions on a Motion to Dismiss. **Federal Rule of Civil Procedure 12(d)**

Under similar circumstances when a Motion to Dismiss is pending before the Court, various Federal Courts have held that the opportunity to be heard is satisfied if the parties are permitted to file Briefs with respect to the issue pending in said motion. **Jordan v. The County of Montgomery, Penn.** 404 F. 2d 747 (CCA-3rd-1969); **Skolnik v. Spolar** 317 F. 2d 857 (CCA-7th-1963) Cert. denied 375 U.S. 904, Rehearing denied 375 U.S. 960 (1963); **Dodd v. Spokane County, Washington,** Supra.

Thus, it is submitted that the District Court afforded the plaintiff due process when it decided the Motion to Dismiss Upon Reconsideration. The Court gave the parties notice of the fact that it was allowing the Motion to Dismiss to be reconsidered. The two motions to dismiss raised all the issues that the Court subsequently decided and both parties were entitled, and in fact did brief the issues presented to the Court.

## B. DID THE DISTRICT COURT ERR IN HOLDING THAT TERMINATION OF APPELLANT'S TELEPHONE SERVICE DID NOT VIOLATE 42 USC 1983 FOR LACK OF STATE ACTION?

### 1. Does the complaint allege sufficient facts to establish a violation of appellant's constitutional protected rights?

In order for the subscriber to be successful under 42 USC 1983, the appellant must allege that the action which deprived him of his civil rights was performed under color of state

law and state facts supporting these allegations. **District of Columbia v. Carter** 409 U.S. 418, 34 L.ed. 2d 613, rehearing denied, 410 U.S. 959, 35 L.ed. 2d 694 (1973); **Griffin v. Breckenridge,** 403 U.S. 88, 29 L.ed. 2d 338 (1971); **Powe v. Miles,** 407 F.2d. 73 (CCA-2nd-1968); **Johnston v. NBC,** 356 F. Supp. 904 (ED-NY-1973). Thus, the District Court initially, and this Court on appeal, is faced with the threshold question as to whether the telephone company when it terminated the subscriber's telephonic service was so acting under color of state law.

Recently, the Supreme Court in **Jackson v. The Metropolitan Edison Co.** 419 U.S. 345, 42 L.ed. 2d 477 (1974) ruled on a similar issue.

**2. Is "Jackson" and the case at bar factually similar?**

The principles enumerated by the Supreme Court in the **Jackson** case, Supra., are applicable to the case at bar. Here, as in **Jackson,** the plaintiff brought suit against the defendant, a privately owned and operated utility corporation which operates under a state regulatory scheme which promotes the public convenience, necessity and welfare (App. Doc. 1). See Conn. Gen. Stat. Title 16 generally, and 16-11 and 16-19 in particular. Here, as in **Jackson,** plaintiff seeks damages and injunctive relief for termination of a utility service allegedly before plaintiff had been afforded notice, a hearing and an opportunity to pay an amounts found due. (App. Doc. 1) In **Jackson,** as in the case at bar, the subscriber claims that his utility service was terminated for alleged non-payment permitted by a provision in telephone company's general tariff filed [1] with the Connecticut Public Utilities Commission. Allegedly, this termination constituted state action depriving

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[1] Southern New England Telephone Company — General Regulations, tariffs Part 1, Sheet 4, Paragraph 23, effective October 15, 1972.

" . . . In the event of the nonpayment of any sum due, the Telephone Company may, after furnishings prior written notice to the subscriber, either temporarily withhold service, or terminate the service and remove the equipment."

subscriber of his property without due process of law and giving rise to a cause of action under 42 USC Sec. 1983.

On almost identical facts in **Jackson,** the United States Supreme Court concluded that the State of Pennsylvania was not sufficiently connected with the challenged termination to make the telephone company's conduct attributable to the State for purposes of the Fourteenth Amendment and therefore the District Court's granting of the Utility's Motion to Dismiss was affirmed.

**3. Does the defendant's alleged monopoly status in furnishing telephone service convert an isolated instance of termination into state action?**

The appellee admits (for purposes of this appeal) that it currently has, but is not guaranteed, a certain monopoly position in the furnishing of certain communications services. This fact alone, is not sufficient to convert an isolated act of termination into state action.

> " . . . But assuming that it had [a monopoly], this fact is not determinative in considering whether Metropolitan's termination of service to petitioner was "state action" for purposes of the Fourteenth Amendment." **Jackson,** Supra., at ————, 484

As a factual matter, under Conn. Gen. Stat. 16-10a, a public service company's franchise can be revoked, and this would dispel any argument that the defendant has a guaranteed monopoly.

**4. Does the defendant's provision of an essential public service convert an isolated act of termination into state action?**

The appellee admits it furnishes essential telephone services. This fact alone does not transmute the termination of this subscriber's utility service from private conduct to state action. As the Supreme Court stated in **Jackson,** Supra.:

"It may well be that acts of a heavily regulated utility

with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." **Jackson,** Supra., at ————, 484 (citations omitted).

Here the challenged action is the termination of utility service. An examination of the nexus between the defendant's termination procedure and the State of Connecticut shows the following:

1.) The plaintiff's telephone service was terminated under tariffs filed by the defendant — not under regulations prescribed by the Connecticut Public Utilitites Commission.

2.) The plaintiff's telephone service was terminated under Tariffs that have been in effect since at least 1934 and these tariffs were not the subject of a Public Utilities Commission hearing. No Public Utilities Commission hearing or approval of tariffs has been alleged by the plaintiff.

These facts rebut the argument that approval by the Connecticut Public Utilities Commission of the defendant's tariffs (passively), constitutes state action. The Supreme Court agrees.

"We also reject the notion that Metropolitan's termination in state action because the state has "specifically authorized and approved" the termination practice. In the instant case, Metropolitan filed with the Public Utilities Commission a general tariff — a provision of which state Metropolitan's right to terminate service for non-payment. This provision has appeared in Metropolitan's previously filed tariffs for many years and has never been the subject of a hearing or other scrutiny by the Commission . . ." **Jackson,** Supra. at ————, 486.

As in the **Jackson** case, the defendant merely filed its tariff and for lack of action of disapproval by the Connecticut Public Utilities Commission, the termination tariff became

effective. [2] Unlike **Public Utilities Commission v. Pollak,** 343 U.S. 451, 96 L.ed. 1068 (1952), in this case at bar the state placed **no** "imprimatur" on defendant's termination tariff.

The Supreme Court in **Jackson** specifically stated:

> "At most, the Commission's failure to overturn this practice amounted to no more than a determination that a . . . utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law when the initiate comes from it and not from the state does not make its action in doing so "state action" for purposes of the Fourteenth Amendment." **Jackson,** Supra. at ————, 487.

This view has been followed in **Teleco v. Southwestern Bell Telephone Co.,** 511 F. 2d. 949 (CA-10th-1975) and more recently in **Goldfarb v. Virginia State Bar,** ———— U.S. ————, 44 L.ed. 2d. 572 (1975) and **Mazzola v. The Southern New England Telephone Company,** 37 Conn. Law Journal 8, (1975) when ruling on an allied issue.

**5. Is there an insufficient symbiotic relationship between the defendant and the Connecticut Public Utilities Commission to transform the defendant's act into state action?**

The defendant admits that under different circumstances, involving different issues, seemingly private conduct will be considered State Action. See **Parker v. Brown,** 317 U.S. 341, 87 L.ed. 315 (1943), and **Burton v. Wilmington Parking Authority,** 365 U.S. 715, 6 L.ed. 2d. 45 (1961). This is especially so where the state has so far insinuated itself into a position of interdependence with private organizations that it must be recognized as a joint participant in a challenged activity. **Burton v. Wilmington Parking Authority,** id.

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[2] See Public Act 75-625 effective December 1, 1975. See Addendum, (Exhibit A) in which the Connecticut Legislature has set forth termination procedures for utilities generally.

Thus the plaintiff must demonstrate in its allegations that there is an interdependence between the defendant and the state, so that the state and the appellee are in essence a joint participant in the termination policies of the defendant.

Apparently, the subscriber is relying on Connecticut General Statutes Sec. 16-49, which provides for the apportionment of expenses of the Public Utilities Commission between the various utilities it regulates. Fifty-six per cent (56%) of the Public Utilities Commission's expenses to a maximum of Six Hundred Thousand Dollars ($600,000.00) is apportioned among these utilities through a ratio between an individual utility's gross earnings and all regulated utilities' gross earnings. (3)

In Connecticut, in 1972, the Public Utilities Commission regulated for purposes of Sec. 16-49: railroad, electric, gas, **telephone,** telegraph, pipe line, water, motor bus, sewage, and community antennae television companies, whose gross receipts or earnings exceed Three Thousand Dollars ($3,000.00) per year. Viewed in this light, all major utilities in the State of Connecticut contribute in part to the expenses of the Connecticut Public Utilities Commission.

A part-time cab driver whose annual receipts are Three Thousand Five Hundred Dollars (3,500.00) is also a contributor to the Public Utilities Commission.(4) A finding of state action in this situation would place and convert into state action not only the actions of all major utilities, but also the part-time cab driver. It appears that such a vast absorption of actions within the ambit of state action was deeply concerning the Supreme Court in **Jackson v. Metropolitan Edison District,**

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(3) The above statute has been amended by Public Act 74-179. As the effective date of said Amendment is later than the termination complained of in this instant case, it is irrelevant as to the facts before this Court.

(4) This minimum has been raised to $100,000.00 by virtue of Public Act 74-179.

Supra. (Footnote 7 at ————, 483) and they declined to do so.

Title 66 of Penn. General Statutes, Sec. 1461 provides that the Penn. Public Utilities Commission must determine its net expenses and allocate that sum among the various groups of utilities as the Public Utilities Commission expenditures for that group's regulation bears to the total of all its expenditures. After said public utility group's particularized expenditures are determined, then each utility within that group pays a porportionate share of said particularized expenditures as said utility's revenues bear to the group's revenues.

Consequently, there is a two-tiered system of interplay between the utilities. If a particular utility's revenue is down, then other utilities within that group assume the shortage, and if an entire group's revenues are decreased for a particular fiscal year, then all other utilities in the state absorb a portion of that decrease by paying a higher pro rata share individually. (See Addendum, Exhibit B).

It is clear that a substantial benefit must be conferred upon the state by the defendant to constitute state action. The appellee must have some enterprise whereby the state benefits **directly** from the defendant's action, as shown in the case of **Burton v. The Wilmington Parking Authority,** Supra.

In **Burton** the state established an agency to run a parking garage complex. The state owned the land, constructed the building and dedicated it to public uses and absorbed the cost of the land, construction and maintenance. It leased part of said garage to a restaurant under a written lease whereby the lessee would pay Twenty-eight Thousand Seven Hundred Dollars ($28,700.00) in rental annually to the state agency. The Supreme Court found under these facts that there was a sufficient interest or joint participation between the parties so as to make the restaurant's actions that of the state.

The Supreme Court indicated in **Burton**:

"only by sifting facts and weighing circumstances can the

non-obvious involvement of the state in private conduct be attributed its true significance." Supra., at 722, 50

It is submitted that the factual context of the case at bar and **Burton** differ so widely so as to make the precedent of **Burton** inapplicable to the instant case. In **Burton** the restaurant was aiding the state in leasing space in a parking authority where the state had undergone all the expense, trouble and **initiative** in establishing the complex. While in the case before the Court, the regulation and the expense sharing were superimposed upon private enterprise already in existence before the Public Utilities Commission was established.

In **Burton** the existence of a lease between the parties was deemed to be of prime importance in establishing state action, as it gave the state a contractual interest in the finances and activities of the restaurant insofar as he lease provided. The Supreme Court in **Jackson,** Supra., has specifically limited the **Burton** holding to factual situations involving lessees of public property, Supra. at ————, 488. See also **Holodnak v. Avco Corp.** 514 F.2d. 285 (CCA-2nd-1975).

There are no allegation of leases between the defendant and the State of Connecticut and the defendant alone is responsible for providing telephonic service to its subscribers. It, like many other corporations of the State, pays Corporate Business Tax (Conn. Gen. Stat. 12-213, et seq.) and a Gross Earnings Tax (Conn. Gen. Stat. 12-256 et seq.) to the State and is subject to regulation by the State. In this regard it is in the same position as the club in **Moose Lodge No. 107 v. Irvis,** 407 U.S. 163, 32 L.ed. 2d. 627 (1972) and the utilities in **Jackson v. The Metropolitan Edison Co., Supra.**

The factor of annual payments by the defendant to the State does not provide the added circumstance so as to tip the balance between private action and state action. This annual payment may be equated to no more than a license fee that taverns, clubs and package stores pay to its appropriate regulatory body, or that the average motorist pays to the Department of Motor Vehicles to enjoy the privilege of driving upon the state's highways.

**6. Does the State have a direct financial benefit in the defendant's termination policy?**

The plaintiff contends that the State has a direct financial benefit in the defendant's acts. The case of **Ihrke v. Northern States Power Co.** 459 F. 2d. 566 (CA-8th-1972) does not offer substantial support to the plaintiff for this proposition as it has been vacated on appeal to the U.S. Supreme Court, see 409 U.S. 815, 34 L.ed. 2d. 72 (1972)

In **Ihrke** the utility had a near monopoly on its service, was subject to a City Public Utilities Commission approval for rates, tariffs, etc. By City Ordinance it was compelled to pay to the City five per cent (5%) of its gross earnings. Under these circumstances the Court of Appeals found that state action existing when the utility terminated subscribers' service pursuant to tariffs.

The Court of Appeals in **Ihrke** laid great emphisis upon the fact that the City had the right to review the utility's termination schedule (which right in fact it did not exercise). The Supreme Court in **Jackson** put to rest the theory that the potentiality of review sustains "state action". To that extent, the viability of **Ihrke** as precedent has been diminished by **Jackson.**

The financial reward to the City in **Ihrke** was directly dependant on the gross revenues of the utility. Thus if the defendant's earnings dropped due to uncollectable accounts, the City's revenues declined also.

In the present case, the appellee's financial contribution is **indirect.** If its revenues decrease because of uncollectable debts owed from its subscribers, naturally its gross earnings would decline as well as its annual assessment to the Public Utilities Commission. However, any decrease by Southern New England Telephone Company in its earnings, would under the 1972 Connecticut General Statutes, Sec. 16-49's ratio formula be assumed or allocated among the other utilities so that the total monies paid the State by all utilities would equal fifty-six per cent (56%) of the Public Utilities Commission's operating budget.

The distinction, then between **Ihrke** on one hand and Southern New England Telephone Company on the other, is that any decline in receipts by Northern States Power Co. would have a **direct casual effect** on the governmental unit, but a similar decrease in earnings by Southern New England Telephone Company would have **no effect** on the Public Utilities Commission as the reduced portion of its share would be assessed to another utility. This other utility and not the State would feel the impact in the defendant's rising bad debts.

Consequently, due to the peculiarities of Connecticut General Statutes Sec. 16-49 (1972) which embraces a ratio formula allowing an industry-wide assessment (instead of an individual commitment), the plaintiff's allegation of state action is negated.

It is clear that the case at bar is on all fours with **Jackson** and plaintiff's allegations and arguments are precisely summarized by the Supreme Court.

> "All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated private utility, enjoying at least a partial monopoly in the providing of . . . service within its territory, and that it elected to terminate service to petitioner in a manner which the . . . Public Utilities Commission found permissible under state law. Under our decision this is not sufficient to connect the State . . . with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment." **Jackson,** Supra, at ————, 488.

## C. DID THE DISTRICT COURT ERR IN HOLDING THAT THE TERMINATION OF THE APPELLANT'S TELEPHONIC SERVICE DID NOT VIOLATE 42 USC, SECTIONS 1985, 1986 AND 1988 DUE TO THE LACK OF AN ALLEGATION OF DISCRIMINATORY ANIMUS?

**1. Has the plaintiff alleged all the elements required to**

**demonstrate deprivation of civil rights under 42 U.S.C., Section 1985(3)?**

The Supreme Court in **Griffin v. Breckenridge,** 403 U.S. 83, 29 L.ed. 2d. 338 (1971) set forth the requirements to determine whether the subscriber's complaint states the cause of action under Sec. 1985 (3), which are as follows; the defendants did:

1. "conspire to go in disguise on the highway or on the premises of another; (and)

2. for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the law . . . ; (and)

3. did, or cause to be done, any act in furtherance of the object of (the) conspiracy whereby another, was;

4a. injured in his person or property, or

4b. deprived of having and exercising any right or privilege of a citizen of the U.S. . . . " Supra., at 102, 348

For the purposes of this appeal, the telephone company would admit that the subscriber has successfully alleged elements 1, 3 and 4 of the above requirements. At issue is whether the subscriber has sufficiently alleged all the requirements to satisfy the second element; that is, the purpose for which the alleged conspiracy was formed. The District Court in its decision below found that this element was lacking (App. Doc. 36, p.2, n.1) as claimed by the appellee in its initial Motion to Dismiss. (App. Doc. 5)

**2. Has the Appellant alleged an invidious discriminatory animus directed at the plaintiff as a member of a particular class?**

**Griffin** requires a conspiracy whose purpose is an invidious discriminatory animus based upon a racial or otherwise class-orientated motivation. In **Griffin** the plaintiffs were a

group of Negroes that were assaulted on the highway by the defendant-whites in the State of Mississippi, when the defendants mistook the plaintiffs for civil rights workers.

Two questions are raised by the requirement in **Griffin** of a racial or otherwise class-based invidious discriminatory animus. First, what racial or class-based group is the appellant a member? Secondly, has discrimination against this group been alleged? The subscriber alleges in Paragraph Three and Nine of the First Count of his Complaint (App. Doc. 1, pg. 1 and 4) that he is a customer, a subscriber, a member of the general public and a citizen, all of which use the services of the telephone company. However, the Supreme Court in **Griffin** stated that the discrimination must be aimed at a **particular** racial or class-based group. Supra. 102, 348

Subsequent to the decision in **Griffin** other federal courts have attempted to define the nature or composition of the affected class. The Ninth Circuit Court of Appeals in **Arnold v. Tiffany,** 487 F. 2d. 216 (CCA-9th-1974) found that the plaintiff must allege to be a member of a particular racial, religious or ethnic group against which the defendant operates in a manner different than that which he conducts himself as to all other members of the general public. Another definition of class has been employed in **Westberry v. Gilman Paper Company,** 507 F. 2d. 206 (CCA-5th-1975) which has defined a class as an indentifiable **body** something less than a structured association of which the complainant is a member. Class has also been indentified as a sexual group; to wit: women, **Stern v. The Massachusetts Indemnity & Life Insurance Co.,** 365 F. Supp. 433 (ED-PA-1972) and **Pendrell v. Chatham College,** 370 F. Supp. 594 (WD-PA-1974), or it may be a particular group within a minority, **McCurdy v. Steel,** 353 F. Supp. 629 (CD-Utah-1973), rev. on other grounds 506 F. 2d. 653 (CCA-10th-1974) or a specific political group or group of supporters for a candidate, as in **Cameron v. Brock** 473 F. 2d. 608 (CCA-6th-1973).

In each of the above cases the complainant was a member of a group which could be easily identified apart from the

general public. This group's nexus was racial, political, ethnic, or sexual. In each of the aforementioned groups, the class has an internal associational focus or a community of identity.

However, in the case at bar, the subscriber has **not** alleged that he is a member of a particular group, but rather that he is a member of the general public, any of whom may have their service terminated if delinquent. It is submitted that the defendant's description of his "class" is more appropriate to class action litigation than to an easily discernable group or association necessary to meet the "class" requirements of 42 U.S.C. 1985 (3) as interpreted by **Griffin v. Breckenridge,** Supra.

3. **Has the defendant alleged discrimination sufficient to comply with 42 U.S.C. 1985 (3)?**

Federal courts following the precedent of **Griffin v. Breckenridge** have held that in order for the complainant to state a cause of action under Sec. 1985 (3), one must allege that the purpose of the conspiracy was discriminatory. See **Arnold v. Tiffany,** Supra; **O'Neil v. Grayson County War Memorial Hospital,** 472 F. 2d. 1140 (CCA-6th-1973); **Westberry v. Gilman,** Supra.; **Azar v. Conley,** 456 F. 2d. 1382 (CCA-6th-1972); **Denman v. Leedy,** 479 F. 2d. 1097 (CCA-6th-1973); **Barrio v. McDonough District Hospital,** 377 F. Supp. 317 (SD-I11-1974); **Granville v. Hunt,** 411 F. 2d. 9 (CCA-5th-1969).

A careful reading of the Complaint of the case at bar fails to disclose an allegation in any of the Five Counts of the plaintiff's Complaint that the purpose of the conspiracy in the termination of the telephonic service or the pleading procedures in the state court action was performed out of a discriminatory motive, animus or intent. (App. Doc. 1)

4. **Has the Appellant stated a cause of action pursuant to 42 U.S.C. 1985 (1) and (2) upon which relief can be granted?**

42 U.S.C. 1985 (1) prohibits comspiracies which prevent by force or threat any person from accepting or performing offic-

ial duties. Subsection two prohibits two or more persons from conspiring for the purpose of impeding or obstructing due course of justice within a state with the intent to deny to that person equal protection of the laws.

Both subsections have had implied with its elements an allegation that the conspirators were operating with a discriminatory class-based motivation. See **Griffin v. Breckenridge** 403 U.S. 88, 29 L. ed. 2d. 338 (1971) and **Johnston v. NBC,** 356 F. Supp. 904, 909 (ED-N.Y.-1973).

It is apparent that if the subscriber was unsuccessful in showing that the telephone company was acting with a class-based bias or animus when it terminated the telephone service or defended a state court action, under 42 U.S.C. 1985 (3), then the subscriber is likewise unsuccessful under 1985 (1) and (2) for the same reasons.

Consequently, the subscriber has unsuccessfully alleged a cause of action under 42 U.S.C. Sec. 1985 (1) and (2).

5. **Has the Appellant alleged a cause of action under 42 U.S.C., Sec. 1986 and 1988?**

42 U.S.C. Sec. 1986 imposes liability upon one who has the ability to prevent violations of 42 U.S.C. 1985 and refuses to so act. Consequently, if there is no violation of Section 1985 then no wrong is committed under this section. **Johnston v. NBC,** Supra, and **Azar v. Conley,** Supra.

Therefore, if the subscriber fails in his allegations of a violation of Section 1985, he likewise is unsuccessful under Section 1986.

42 U.S.C. 1988 does not state a separate cause of action nor import into federal law state causes of action. This section was meant to instruct the federal courts as to the applicable law governing claims arising under Federal Civil Rights Acts. **Moor v. County of Alameda,** 411 U.S. 693, 36 L. ed. 2d. 596 (1973); **Post v. Payton,** 323 F. Supp. 799 (ED-N.Y.-1971).

Consequently, the appellant has failed to state a cause of action under this section.

## SUMMARY

The appellees respectfully urge this Court to affirm the decision of the District Court granting the appellees' Motion to Dismiss for failure to state a claim upon which relief can be granted for the reasons that:

a. the appellee, telephone company, was not acting under color of state law; and

b. it was not acting with a invidious discriminatory animus when it terminated the appellant's telephone service or engaged in the pleading process in state court litigation.

Respectfully submitted,

Peter J. Tyrrell

PETER J. TYRRELL

# Exhibit A.

Substitute House Bill No. 7491

PUBLIC ACT NO. 75-625

AN ACT CONCERNING THE TERMINATION OF SERVICE BY PUBLIC SERVICE COMPANIES.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (a) No electric, gas, telephone or water public service company, and no municipal utility furnishing electric, gas or water service may terminate such service to a residential dwelling on account of non-payment of a delinquent account unless such company or municipal utility first gives notice of such delinquency and impending termination, at least seven calendar days prior to the proposed termination, by first class mail addressed to the customer to which such service is billed.

(b) No such company or municipal utility shall effect termination of service for non-payment during such time as any resident of a dwelling to which such service is furnished is seriously ill, if the fact of such serious illness is certified to such company or municipal utility by a registered physician within such period of time after the mailing of a termination notice pursuant to subsection (a) of this section as the public utilities commission may by regulation establish, provided the customer agrees to amortize the unpaid balance of his account over a reasonable period of time and keeps current his account for utility service as charges accrue in each subsequent billing period.

(c) No such company or municipal utility shall effect termination of service to a residential dwelling for non-payment during the pendancy of any complaint, investigation, hearing or appeal, initiated by a customer within such period of time after the mailing of a termination notice pursuant to subsection (a) of this section as said commission may by regulation establish; provided, any telephone company during the pendancy of any complaint, investigation, hearing or appeal may terminate telephone service if the amount of charges accruing and outstanding subsequent to the initiation of any complaint, investigation, hearing or appeal exceeds on a monthly basis the average monthly bill for the previous three months or if the customer fails to keep current his telephone account for all undisputed charges or fails to comply with any amortization agreement as hereafter provided.

(d) Any customer who has initiated a complaint or investigation under subsection (c) of this section shall be given an opportunity for review of such complaint or investigation by a review officer of the company or municipal utility other than a member of such company's or municipal utility's credit department, provided the commission may waive this requirement for any company or municipal utility employing fewer than twenty-five full-time employees, which review shall include consideration of whether the customer should be permitted to amortize the unpaid balance of his account over a reasonable period of time. No termination shall be effected for any customer complying with any such amortization agreement, provided such customer also keeps current his account for utility service as charges accrue in each subsequent billing period.

(e) Any customer whose complaint or request for an investigation has resulted in a determination by a company or municipal utility which is adverse to him may appeal such determination to the public utilities commission or a hearing officer appointed by the commission.

(f) If, following the receipt of a termination notice or the entering into of an amortization agreement, the customer makes a payment or payments amounting to twenty per cent of the balance due, the public service company shall not terminate service without giving notice to the customer, in accordance with the provisions of section 1, of the conditions the customer must meet to avoid termination, but such subsequent notice shall not entitle such customer to further investigation, review or appeal by the company, municipal utility or commission.

Sec. 2. Section 16-262c of the general statutes is repealed and the following is substituted in lieu thereof:

[No] NOTWITHSTANDING ANY OTHER PROVISION OF THE GENERAL STATUTES, NO electric, gas, TELEPHONE or water company AND NO MUNICIPAL UTILITY FURNISHING ELECTRIC, GAS, TELEPHONE OR WATER SERVICE shall, by reason of delinquency in payment for any electric, gas, TELEPHONE or water services, cause cessation of any such services on any Friday, Saturday, Sunday, legal holiday or day before any legal holiday or at any time during which the business offices of any such electric,

gas, TELEPHONE or water company OR MUNICIPAL UTILITY are not open to the public.

Sec. 3. (NEW) (a) Notwithstanding the provisions of section 1 of this act, wherever an owner, agent, lessor or manager of a residential dwelling is billed directly by an electric, gas, telephone or water public service company or by a municipal utility for utility service furnished to such building not occupied exclusively by such owner, agent, lessor, or manager, and such company or municipal utility has actual or constructive knowledge that the occupants of such dwelling are not the persons to whom the company or municipal utility usually sends its bills, such company or municipal utility shall not terminate such service for nonpayment of a delinquent account owed to such company or municipal utility by such owner, agent, lessor or manager unless: (1) Such company or municipal utility makes a good faith effort to notify the occupants of such building of the proposed termination by the means most practicable under the circumstances and best designed to provide actual notice; and (2) such company or municipal utility provides an opportunity, where practicable, for such occupants to receive service in their own names without any liability for the amount due while service was billed directly to the lessor, owner, agent or manager and without the necessity for a security deposit; provided, if it is not practicable for such occupants to receive service in their own names, the company or municipal utility shall not terminate service to such residential dwelling but may pursue the remedy provided in section 4 of this act.

(b) Whenever a company or municipal utility has terminated service to a residential dwelling whose occupants are not the persons to whom it usually sends its bills, such company or municipal utility shall, upon obtaining knowledge of such occupancy, immediately reinstate service and thereafter not effect termination unless it first complies with the provisions of subsection (a).

(c) Any payments made by the occupants of any residential dwelling pursuant to subsection (a) of this section shall be deemed to be in lieu of an equal amount of rent or payment for use and occupancy and each occupant shall be permitted to deduct such amounts from any sum of rent or payment for use and occupancy due and owing or to become due and owing to the owner, agent, lessor or manager.

(d) Wherever a company or municipal utility provides service pursuant to subdivision (2) of subsection (a), the company or municipal utility shall notify each occupant of such building in writing that service will be provided in the occupant's own name. Such writing shall contain a conspicuous notice in boldface type stating,

"NOTICE TO OCCUPANT. YOU MAY DEDUCT THE FULL AMOUNT YOU PAY (name of company or municipal utility) FOR (type of service) FROM THE MONEY YOU PAY YOUR LANDLORD OR HIS AGENT."

(e) The owner, agent, lessor or manager shall not increase the amount paid by such occupant for rent or for use and occupancy in order to collect all or part of that amount lawfully deducted by the occupant pursuant to subsections (c) and (d) of this section.

(f) Nothing in this section shall be construed to prevent the company or municipal utility from pursuing any other action or remedy at law or equity that it may have against the owner, agent, lessor, or manager.

Sec. 4. (NEW) (a) Upon default of the owner, agent, lessor or manager of a residential dwelling who is billed directly by an electric, gas, telephone or water company or by a municipal utility for utility service furnished to such building, such company or municipal utility may petition the court of common pleas or a judge thereof, if the court is not in session, for appointment of a receiver of the rents or payments for use and occupancy for any dwelling for which the owner, agent, lessor or manager is in default. The court or judge shall forthwith issue an order to show cause why a receiver should not be appointed, which shall be served upon the owner, agent, lessor or manager or his agent in a manner most reasonably calculated to give notice to such owner, agent, lessor or manager as determined by such court or judge, including, but not limited to, a posting of such order on the premises in question. A hearing shall be had on such order no later than seventy-two hours after its issuance or the first court day thereafter. The sole purpose of such a hearing shall be to determine whether there is a sum due and owing between the owner, agent, lessor, or manager and the company or municipal utility. The receiver appointed by the court shall collect all rents or payments for use and occupancy forthcoming from the occupants of the building in question in place of the owner,

agent, lessor or manager. The receiver shall pay the petitioner, from such rents or payments for use and occupancy, for electric, gas, telephone or water supplied on and after the date of his appointment. The owner, agent, lessor or manager shall be liable for such reasonable fees and costs determined by the court to be due the receiver, which fees and costs may be recovered from the rents or payments for use and occupancy under the control of the receiver, provided no such fees or costs shall be recovered until after payment for current electric, gas, telephone and water service has been made. The owner, agent, lessor or manager shall be liable to the petitioner for reasonable attorney's fees and costs incurred by the petitioner, provided no such fees or costs shall be recovered until after payment for current electric, gas, telephone and water service has been made and after payments of reasonable fees and costs to the receiver. Any monies from rental payments or payments for use and occupancy remaining after payment for current electric, gas, telephone and water service, and after payment for reasonable costs and fees to the receiver, and after payment to petitioner for reasonable attorney's fees and costs, shall be applied to any arrearage found by the court to be due and owing the company or municipal utility from the owner, agent, lessor or manager for service provided such building. Any monies remaining shall be turned over to the owner, agent, lessor or manager. The court may order an accounting to be made at such times as it determines to be just, reasonable, and necessary.

(b) Any receivership established pursuant to subsection (a) shall be terminated by the court upon its finding that the arrearage which was the subject of the original petition has been satisfied, or that all occupants have agreed to assume liability in their own names for prospective service supplied by the petitioner, or that the building has been sold and the new owner has assumed liability for prospective service supplied by the petitioner.

(c) Nothing in this section shall be construed to prevent the petitioner from pursuing any other action or remedy at law or equity that it may have against the owner, agent, lessor or manager.

(d) Any owner, agent, lessor or manager who collects or attempts to collect any rent or

payment for use and occupancy from any occupant of a building subject to an order appointing a receiver shall be found, after due notice and hearing, to be in contempt of court.

Sec. 5. (NEW) Any wilful or malicious violation of this act by any agent, owner, lessor, manager or any company or municipal utility shall be punishable by a fine of not more than five hundred dollars or imprisonment for not more than thirty days or both.

Sec. 6. (NEW) Nothing in this act shall be construed to prevent the occupant of such building from pursuing any other action or remedy at law or equity that it may have against the owner, agent, lessor, manager, company or municipal utility.

Sec. 7. (NEW) The public utilities commission shall adopt regulations necessary to carry out the purposes of this act.

Sec. 8. This act shall take effect December 1, 1975.

*Certified as correct by*

_____

*Legislative Commissioner.*

_____

*Clerk of the Senate.*

_____

*Clerk of the House.*

Approved July 7, 1975.

_____

*Governor.*

Exhibit B



tion in order to give her status of contract carrier on June 1, 1937, which was date applicant's right to certificate was to be determined. Spackman v. Pennsylvania Public Utility Commission, 14 A.2d 839, 141 Pa.Super. 164, 1940.

2. Conclusiveness of orders and findings

Finding and order of Public Service Commission of unreasonableness of freight rates theretofore charged held appealable as determination that railroads had committed tort and of obligation to make compensation, in view of constitutional requirement of judicial review as element of due process, and hence on failure to appeal therefrom railroads were bound by finding and order and were precluded from litigating reasonableness of rates, their relation to long and short haul provisions, and undue prejudice to other shippers in subsequent action to recover reparation awards. Allegheny Steel Co. v. New York Cent. R. Co., 188 A. 332, 324 Pa. 353, 1936.

Schedule of rates approved by Public Service Commission was binding on every person affected, unless unusual circumstances are present. Springfield Consol. Water Co. v. City of Philadelphia, 131 A. 716, 285 Pa. 172, 1[illegible]

Carrier's failure to appeal, under Act 1913, July 26, P.L. 1374, art. VI, § [illegible] repealed, from order of commission fixing reasonable rates, waived right to review and debarred it from complaining reduction was made without approval of Interstate Commerce Commission. New York & Pennsylvania Co. v. New York Cent. R. Co., 126 A. 382, 281 Pa. 257, 1924, affirmed New York Cent. R. Co. v. New York & Pennsylvania Co., 46 S.Ct. 447, 271 U.S. 124, 70 L.Ed. 865.

Under Act 1913, July 26, P.L. 1374, art. VI, § 31, repealed, carrier failing to appeal from an order determining that rates were unreasonable could not in subsequent proceedings for reparation raise again the issues determined against it in the prior proceedings. New York & Pennsylvania Co. v. New York Cent. R. Co., 110 A. 286, 267 Pa. 61, 1920.

## ARTICLE XII.—EXPENSES AND FEES OF COMMISSION

### § 1461. Assessment of regulatory expenses upon public utilities

(a) Whenever the commission, in the performance of its duties under this act, shall conduct an investigation of the affairs of any public utility, involving an examination of the records or facilities thereof, such public utility shall pay to the commission a sum equal to the salaries paid to commission employes while engaged in such examination, together with such traveling and subsistence expenses of said employes as may be directly attributable to such examination: Provided, however, That the amount so assessed against any public utility during any one calendar year shall not exceed one per centum of the gross intrastate operating revenues thereof during the next preceding calendar year: And provided further, That whenever the commission shall conduct an investigation of the affairs of two or more utilities jointly, the assessment under this subsection shall be prorated among such utilities upon the basis of their gross intrastate operating revenues.

(b) On or before March thirty-first of each year, every public utility shall file with the commission a statement under oath showing its gross intrastate operating revenues for the preceding calendar year: Provided, however, That if any public utility shall fail to file such statement

on or before March thirty-first as aforesaid the commission shall estimate such revenues, which estimate shall be binding upon the public utility for the purposes of this section. Periodically, the commission shall determine the aggregate of its expenditures, less (1) amounts assessable under paragraph (a) hereof; (2) expenditures for equipment, furniture, and machinery; (3) the estimated cost of regulating municipal corporations furnishing public service; and (4) the estimated cost of regulating contract carriers by motor vehicle. The remaining balance shall be so allocated to the groups of public utilities furnishing the various types of service that each group shall have allocated to it—(1) an amount equal to the expenditures of the commission directly attributable to the regulation of that group; and (2) an amount equal to such proportion of the expenditures of the commission not directly attributable to any group, as the gross intrastate operating revenues of the group bear to the total gross intrastate operating revenues of all public utilities: Provided, however, That there shall be deducted from the allocations to each group an amount equal to the fees paid to the commission by the public utilities in such group under the provisions of sections twelve hundred two and twelve hundred three of this act.[1] Every public utility shall then pay to the commission an amount equal to such proportion of the allocation to its group as the gross intrastate operating revenues of the public utility bear to the total gross intrastate operating revenues of the group.

(c) The commission shall give notice by registered mail to each person or corporation of the amount lawfully charged against him or it under the provisions of this section. Within fifteen days after receipt of such notice, the party against which such assessment has been made may file with the commission objections setting out in detail the grounds upon which the objector regards such assessment to be excessive, erroneous, unlawful or invalid. The commission, after notice to the objector, shall hold a hearing upon such objections. After such hearing, the commission shall record upon its minutes its findings on the objections and shall transmit to the objector, by registered mail, notice of the amount, if any, charged against him in accordance with such findings. Each person or corporation shall pay the amount of any such assessment to the commission within thirty days after receipt of notice of such assessment, unless objections are filed thereto, in which case such assessment shall be paid within ten days after receipt of notice of the findings of the commission with respect to such objections. If payment is not made as aforesaid, the commission may suspend or revoke certificates of public convenience, certify automobile registrations to the Secretary of Revenue for suspension or revocation or, through the Department of Justice, may institute an appropriate action at law for the amount lawfully assessed, together with any additional cost incurred by

the commission or the Department of Justice by virtue of such failure to pay.

(d) No suit or proceeding shall be maintained in any court for the purpose of restraining or in anywise delaying the collection or payment of any assessment made under paragraphs (a), (b), and (c) of this section, but every person or corporation against whom or which an assessment is made shall pay the same as provided in paragraph (c) of this section. Any person or corporation making any such payment may, at any time within two years from the date of payment, sue the Commonwealth in an action at law to recover the amount paid, or any part thereof, upon the ground that the assessment was excessive, erroneous, unlawful, or invalid, in whole or in part, provided objections, as hereinbefore provided, were filed with the commission, and payment of the assessment was made under protest either as to all or part thereof. In any action for recovery of any payments made under this section, the claimant shall be entitled to raise every relevant issue of law, but the findings of fact made by the commission, pursuant to this section, shall be prima facie evidence of the facts therein stated. Any records, books, data, documents, and memoranda relating to the expenses of the commission shall be admissible in evidence in any court, and shall be prima facie evidence of the truth of their contents. If it is finally determined in any such action that all or any part of the assessment for which payment was made under protest was excessive, erroneous, unlawful, or invalid, the commission shall make a refund to the claimant as directed by the court, which shall be made from the current appropriation of the commission.

(e) The provisions of this act relating to the judicial review of orders and determinations of the commission shall not be applicable to any findings, determinations, or assessments made under this section. The procedure in this section providing for the determination of the lawfulness of assessments and the recovery back of payments made pursuant to such assessments shall be exclusive of all other remedies and procedures.

(f) It is the intent and purpose of this section that the several groups of persons and corporations subject to this act shall each contribute, by way of assessments, sufficient funds to the Commonwealth to reimburse the Commonwealth for the reasonable cost of regulating the respective groups. The commission shall keep records of the costs incurred in connection with the administration and enforcement of this act, or any other act. The commission shall also keep a record of the manner in which it shall have computed the amount assessed against every person or corporation. Such records shall be open to inspection by all interested parties. The determination of such costs and assess-

ments by the commission, and the records and data upon which the same are made, shall be considered prima facie correct; and in any proceeding instituted to challenge the reasonableness or correctness of any assessment under this section, the party challenging the same shall have the burden of proof. 1937, May 28, P.L. 1053, art. XII, § 1201; 1938, Sp.Sess., Sept. 28, P.L. 44, § 1; 1941, July 8, P.L. 280, § 1.

1 Sections 1462 and 1463 of this title.

### Historical Note

The act of 1938 purported to amend section 1201 of the Act of 1937 "to read as follows." As set out in that act, the section contained only two subsections numbered (a) and (b). However, the Act of 1941 purports to amend "subsections (a), (b) and (c)," which seems to indicate that the Legislature does not regard subsections (c) to (f) as eliminated by the Act of 1938. They are accordingly set out in the text.

This section was wholly rewritten by the amendatory Act of 1938.

Prior to the 1941 amendment, the proviso to subsection (a) read as follows: "Provided, however, That the amount so paid by any public utility during any one calendar year shall not exceed one per centum of the gross intrastate operating revenues thereof during its next preceding fiscal year."

The same amendment added the first sentence of subsection (b), and inserted the provision relating to the suspension or revocation of the certificates if payment is not made, toward the end of subsection (c).

### Notes of Decisions

Construction and application 1
Costs 2
Refunds 3

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#### 1. Construction and application

A public utility company is not entitled to have an estimated assessment made against it for 1941, upon its failure to file a statement of the amount of its intrastate business, set aside on ground that its failure to file such a statement was due to commissions having sent request for information to wrong address and company's assumption that such information was required only biannually as formerly, for it is charged with knowledge of the 1941 amendment to act 1937, May 28, P.L. 1053, art. XII, § 1201. Branch Motor Exp. Co. v. Com., 69 D. & C. 377, 60 Dauph. 288, 1950.

Considering the whole Public Utility Code the Legislature did not intend, by act of May 28, 1937, P.L. 1053, § 1201, subsec. (b), to limit the Commission in proceeding upon its own motion on a complaint, but that it intended the Commission to proceed on its own motion, or on complaint, or upon application to it. Overbrook Steam Heat Co. v. Commonwealth, 40 D. & C. 401, 50 Dauph. 120, 1941.

A public utility instituted equity proceedings to recover from the Commonwealth an assessment which the utility had paid, under protest, for an investigation of the utility. An affidavit of defense raising questions of law could not be sustained because the averment that no complaint was filed must be taken to be true; and if no complaint was filed, the Commission had no authority under this section, to make the assessment. Overbrook Steam Heat Co. v. Commonwealth, 38 D. & C. 286, 48 Dauph. 371, 1940.

Assessments under this section, constitute real license fees. Davidson Transfer and Storage Co. v. City of Philadelphia, 3 D. & C.2d 58, 1956.

Where public utility was adjudged liable to make reparations to patrons for improper rates, and failed to produce information to commission even after hearings, as to patrons complainant and non-complainant entitled to reparations, it was lawful for commission to examine records of defaulting utility and recover expenses of its employees for salaries, travel and subsistence, under this section and sections 1153, 1217 of this title. Com. v. Cheltenham and Abington Sewerage Co., 64 Montg. 212, 1949.

#### 2. Costs

Where complainant did not ask for or contemplate the Public Utility Commis-

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

| | | |
|---|---|---|
| DAVID L. SALISBURY | ) | |
| Plaintiff-Appellant | ) | CIVIL APPEAL NO. 75-7324 |
| v. | ) | |
| THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, INC., et als | ) | |
| Defendants-Appellees | ) | |

CERTIFICATION OF SERVICE

Peter J. Tyrrell, Attorney for the Appellees in the above entitled cause, hereby certifies that a copy of the following Brief of the Appellee and Addendum has been mailed to David L. Salisbury, Pro Se, by depositing the same in the U.S. Mail, postage paid, addressed to him at P.O. Box 1771, Waterbury, Connecticut, 06720, his last known address, on or about January 9, 1976.

Peter J. Tyrrell

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